Supreme Court of the United States

October Term, 1939

Original No.....

In Parte:

In the Matter of Wallace S. Bransford, as County Treasurer of Pima County, Arizona, and ex-officio Tax Collector.

BRIEF IN RESPONSE TO RULE REQUIRING RESPONDENT TO SHOW CAUSE WHY LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS SHOULD NOT BE GRANTED.

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R & G PRINTERY PHOENIX, ARIZONA

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Conceding, generally, the correctness of the petitioner's statement of the case, subject to certain exceptions which we shall point out as we go along, it is our position that the case set forth in the exhibit attached to the petition for writ of mandamus is not a three-judge case within the meaning of Sec. 266 of the Judicial Code, for the following reasons:

1. The complaint attached as an exhibit to the petition for writ of mandamus does not state a case against state officers; and

2. Said complaint does not state a case for an injunction upon the ground of the unconstitutionality of a state statute.

Considering the first question above mentioned, we point out that the defendants are four counties of the State of Arizona, the county treasurers, county assessors and boards of supervisors of those counties, and the three members of the State Tax Commission, constituting also the State Board of Equalization of the State of Arizona. Obviously, only the last three defendants are prima facie state officers. It appears from the complaint that the State Board of Equalization and the State Tax Commission have taken no action with respect to the matters complained of. They are charged only with failure to correct the erroneous assessments upon application made to them. The complaint seeks only to enjoin the collection of taxes assessed for the year 1935, of which the assessment process has long since been completed, and the only thing that remains to be done is to make the actual collection, the duty of which rests upon the county treasurers, and against which the injunctive relief is sought. The presence of the members of the State Tax Commission and State Board of Equalization in the suit generates no interest which it is the purpose of Section 266 to protect.

Wilentz v. Sovereign Camp W.O.W.
306 U. S. 573-583
83 Law Ed. 994-1000
59 S. Ct. 709

Whether said complaint states a three-judge case within the meaning of Section 266, therefore, must be

determined with reference to the status occupied under the laws of Arizona by the county treasurers of that state. If such county treasurers are not state officers performing functions of state-wide concern the case is not a three-judge case.

Ex parte: Collins 277 U. S. 565,
72 Law Ed. 990
48 S. Ct. 585

Ex Parte: Public National Bank,
278 U. S. 101
73 Law Ed. 202
49 S. Ct. 43

Rorick v. Commissioners,
307 U. S. 208-213
83 Law Ed. 1242-1244
59 S. Ct. 808

It is argued in petitioner's brief that the county treasurers of the State of Arizona are state officers within the meaning of said Sec. 266 and the decision of this court in Spielman Motor Sales Co. v. Dodge, 295 U. S. 89, 79 Law Ed. 1322, 55 S. Ct. 678. This contention of petitioner is not substantiated by the facts. Under Article 12 of the Constitution of Arizona, a copy of which is inserted in the appendix hereto, counties of the state are bodies politic and corporate and there are created for each of said counties the offices of sheriff, recorder, treasurer, school superintendent, county attorney, assessor and county superintendent of roads, each of which are to be elected

by the qualified electors of the county and for which compensation is to be paid out of the county treasury In Secs. 760 and 761 of the Revised Code of Arizona, 1928, each county is declared to be a body politic and corporate and its powers are prescribed. Among these are the power to sue and be sued and the power to levy and collect taxes. In Secs. 823, 824, 830 and 832 of the Revised Code of Arizona, 1928, qualifications are prescribed for county officers. Said officers are enumerated; provision is made that certain of them —among them being the county treasurer—must reside at the county seat; and that they must give bond. Among the officers so enumerated is the county treasurer, and it provided that he shall be ex-officio tax collector. Secs. 864, 873, 874, 875 and 876 Revised Code of Arizona, 1928, prescribe the duties of the county treasurer and provide for the handling of moneys by him. Among these duties is that of remitting state taxes collected by him to the State Treasurer. The text of the statutory provisions herein referred to will be found in the appendix at the end of this brief.

From said provisions it is clear that the county treasurer under the Arizona statutory system is a county officer elected in his county, required to reside therein, paid his salary by the county, and exercising no powers outside of his county. Among his duties, however, is that of collecting taxes in his county, not only for county purposes but for state, municipal and school district purposes.

It has been mentioned above that Sec. 876 Revised Code of Arizona, 1928, requires the county treasurer to transmit state taxes collected to the State Treasurer. Other sections of the same code require him to handle and dispose of school district money and still other sections of said code provide for the handling of money of cities and towns, except those having special charters. But, nowhere in the law, is there any provision designating him as an officer of any of the legal entities whose tax money he collects except that he is designated as county treasurer and ex-officio tax collector, and in the case of irrigation districts he is expressly made ex-officio treasurer for the districts by Sec. 3363 Revised Code of Arizona, 1928. Petitioner's assertion that the county treasurer is ex-officio a tax collector for state taxes is not supported by the statutes of Arizona. Sec. 3110 Revised Code of Arizona, 1928, declares him to be county treasurer and ex-officio tax collector.

Under the system set up by the statutes of Arizona, the counties of the state and not the county treasurers are the tax collection agencies for the collection of all taxes within their borders, excepting only taxes collected for a few special charter cities and towns. As has been stated above, the Constitution constitutes counties bodies politic and corporate and consequently they possess the legal capacity to be vested by law with the power of levying and collecting taxes and by statute they are granted the exercise of that power

over all taxes to be levied and collected within their respective borders.

Taxes collected from the taxpayer by the counties are collected by them in a lump sum of which a part is for the state, a part for the county and a part for the school district and if the property assessed is in a city or town, a part is for the city or town. The money so collected becomes public money of the county.

Jarvis v. Hammons,
32 Ariz. 318
257 Pac. 985

The statutes provide for adjustment of accounts between the state and the county. If illegal taxes are collected, the suit to recover them is against the county as such and the judgment for their recovery goes against the county and becomes a judgment on an equality with other like obligations of the county. This is settled by the decisions of the Supreme Court of Arizona.

County of Maricopa v. Hodgin,
46 Ariz. 247-255
50 Pac. (2d) 15

Powell v. Gleason,
50 Ariz. 542, 550
74 Pac. (2d) 47

Note the following language in the case of County of Maricopa v. Hodgin, supra, page 252 Ariz. Report:

> "Under the law the county is constituted the agent of the state to collect the taxes for the state, the county, and school districts."

And in Powell v. Gleason, supra, page 550, Ariz. Report the following:

> "In the chapter now under consideration, the taxes involved are paid to the county assessor, rather than to the county treasurer, but we think the difference is immaterial. Ad valorem property taxes are usually collected by the counties through their county treasurers, and then distributed in the manner provided by law. We think, in reason, the section applies to such taxes when collected by the county assessor, as well as by the treasurer, since in both cases it is the county, in effect, which receives the taxes, though through different officers, and a suit to recover the tax illegally collected is brought against the county."

And in Jarvis v. Hammons, supra, page 320, Ariz. Report the following:

> "The various organizations within the county for whose benefit taxes are collected by the county treasurer, hold the same relation to the county that depositors hold to their bank. The money deposited loses its identity, and the bank becomes debtor to the depositor."

There can be no doubt that under the above authoritative declarations of the Supreme Court of Arizona,

the counties are tax collectors for the state and the county treasurer is merely an officer of the county exercising his duties within the county and for the county.

The facts above stated sharply differentiate this case from the case of Spielman Motor Sales Company v. Dodge, 295 U. S. 89-97, 79 Law Ed. 1332, 55 S. Ct. 678. In that case this court stated that in determining the application of Sec. 266, this court must have regard to both the nature of the legislative action which is assailed and to the function of the officer sought to be restrained. The court considered the status of the district attorney under the laws of New York and found that he was deemed a part of the judicial system of the state and performed within his county a distinctively state function. He was sought to be restrained in the particular case from enforcing a statute embodying a policy of state-wide concern. He was not enforcing such statute on behalf of the county nor in the performance of any function that the county was required to perform under the state statutes.

We think the case now before this court in its relation to Sec. 266, is like the case of ex parte Collins, supra. In that case the state by a general law delegated its power to improve highways within city limits to the respective cities. It was sought to restrain the officials of the City of Phoenix from exercising this delegated power upon the ground that the general state

law delegating this power was unconstitutional. This court held that officials who merely exercised power delegated by the state to a municipality to be exercised only within the municipality, were not state officers but were merely local officers and, hence, no three-judge case was presented.

In this case, the state by general law has delegated the power of collecting taxes within the counties to the respective counties, and it is sought to enjoin the collection of those taxes by an officer of the county.

In line with the principle of the Collins case, this court must hold that an officer of the county is not a state officer when he, as such officer of the county, exercises a state power delegated to his county.

The case is different from the case of Spielman v. Dodge, supra, in that in said Spielman case, the power of enforcing the state law was vested in the district attorney by the state law, while in this case, the power of collecting the taxes is vested in the county by the state law, and hence, the county officers in exercising the power, merely act for and on behalf of the county.

This case differs from the Spielman case also in that in the Spielman case, it was sought to enjoin the enforcement of a statute embodying a policy of state-wide concern. In this case it is not sought to enjoin the enforcement of a state statute but merely to enjoin the enforcement of assessments levied by four

counties in pursuance of a policy adopted by only four of the eight counties in which the bank does business. (Exhibit attached to petition Par. XI, page 26). Obviously this policy of these four counties of endeavoring to collect taxes either directly or indirectly imposed on preferred bank stock held by Reconstruction Finance Corporation, which is responsible for this litigation, is not a policy of state-wide concern in Arizona, but is a policy in a few counties only. Hence, the case is not a three-judge case.

Rorick v. Commissioners,
307 U. S. 208-213
83 Law Ed. 1242, 1244
59 S. Ct. 808.

The precise question as to whether a county treasurer who collects state taxes, together with county and other local taxes, is a state officer, does not appear to have been passed on by this court. It was mentioned but found unnecessary to be decided in ex parte: Williams, 277 U. S. 267, 72 Law Ed. 877, 48 S. Ct. 71. The question, however, has been passed on in a number of instances by the lower Federal Courts, and in some of those cases this court has inferentially approved the decision of the lower court by its failure to mention the subject.

In re Henrietta Mills Co. v. Rutherford,
26 Fed. (2d) 799
281 U. S. 121
74 Law Ed. 737,
50 S. Ct. 270

Pleasant v. Missouri, etc. R. Co.,
66 Fed. (2d) 843 (Writ of certiorari denied,
291 U. S. 659, 78 Law Ed. 1051, 54 S. Ct. 376)

Schermerhorn Inc. v. Holloman,
74 Fed. (2d) 265, 266, (Writ of certiorari denied
in 294 U. S. 721, 79 Law Ed. 1253, 55 S. Ct. 548)

Connecting Gas Company v. Imes,
11 Fed. (2d) 191-195.

The above cases arose under the statutes of North Carolina, Kansas, Oklahoma and Ohio. In North Carolina the restraining order was sought against the sheriff who collects county taxes and some state taxes. In each of the other three states mentioned the restraining order was sought against the county treasurer who collects state, county and other local taxes under statutes very similar to the statutes of Arizona, (Kansas 1935 Code Sec. 79-2201, Oklahoma Stat. Ann. Title 19, Sec. 625, and Title 68 Secs. 252 and 295, Pages Ohio General Code, 1937 Secs. 2688 and 2692.) In all of the above cases it was held by the lower courts that the local tax collecting officers were not state officers. See note 83 Law Ed., page 1195.

It is also clear that the complaint which is attached as an exhibit to petitioner's motion for writ of mandamus is not based upon the unconstitutionality of a state statute and, of course, no administrative order is involved. The complaint states a suit to enjoin the enforcement of an assessment (Exhibit attached to

petition Par. XXXIX, pages 68-72), which is not an administrative order.

Gulley v. Inter-State National Gas Co.,
299 U. S. 16, 18
78 Law Ed. 1088,
54 S. Ct. 565

Nowhere in the complaint is there any charge of unconstitutionality of any state statute. The complaint alleges that the Maricopa County assessment is a direct assessment of preferred stock of the bank held by Reconstruction Finance Corporation (Exhibit attached to petition Par. XII, pages 26-27). Therefore, the collection of said assessment is in violation of the act of Congress of March 20, 1936, (U. S. Code Ann. Title 12, Sec. 51d, page 124, 125) prohibiting the assessment or collection of taxes on preferred stock of banks held by Reconstruction Finance Corporation, and also in violation of Sec. 2 of Article IX of the Arizona State Constitution. No Statute of the state attempts to provide for the assessment of taxes upon shares of preferred stock of banks held by Reconstruction Finance Corporation. The assessments in Pima and Graham counties, Pima being the county of which the petitioner is the treasurer, was made upon a different basis. The assessments are set forth verbatim in the complaint (Exhibit attached to petition, Par. XIII and XVI, pages 28 and 31) and it appears therefrom that they are mere assessments to the bank of the real and personal property owned by the bank

in the respective counties. Hence, the assessments are in violation of the Secs. 3069 and 3071 (see pages 6 and 7 of Petitioner's Brief), Revised Code of Arizona, 1928, and void.

Gibbons v. White,
47 Ariz. 180,
54 Pac. (2d) 555

The complaint shows, further, that if the assessments in Pima and Graham counties are construed as assessments of the preferred and common stock of the bank they are not in compliance with the statutes of Arizona and are also in violation of the act of Congress of March 20, 1936, prohibiting the assessment of shares of preferred stock and the constitution of the State of Arizona (Exhibit attached to petition, Par. XVIII, pages 36-37) and that if said assessments are construed as assessments of the shares of common stock of the bank, they are discriminatory assessments (Exhibit attached to petition, Par. XVIII, pages 37-40) and also in violation of the Federal Act permitting the assessment of shares of stock in National Banks (U. S. Code Ann. Title 12, Sec. 548, page 604). But petitioner states in his brief that, obviously, the assessment in Pima County is an assessment upon the shares of common stock. This assertion is a far stretch of the imagination. It appears to be an assessment of property to the bank (Exhibit attached to petition, Par. XIII, pages 28-29). The words in small type near the top, "Co-Apportionment—13,795.6 shares

of stock @ $23,7459 totalling $327,590.00" cannot be construed as an assessment of the shares of common stock of the bank for it appears that the bank has 52,000 shares of common stock of the par value of $5.00 each and 198,400 shares of preferred stock of $6.25 each, the latter being held by Reconstruction Finance Corporation (Exhibit attached to petition, Par. VI, pages 21-22). It is true, as petitioner says, the list of shareholders was filed with the assessor as required by the law, but the assessment wholly disregards said shareholders and the shares owned by them.

But, even if we should indulge in the assumption that the assessment of $327,590.00 was assessed as the value of the 52,000 shares of common stock of the bank apportionable to Pima County, still, restraining the collection of such an assessment, is not an attack upon the constitutionality of the concluding sentence of Sec. 3071 (Petitioner's Brief, pages 6, 7 and 8) of the Revised Code of Arizona, 1928. "It will be noted that Sec. 3069 provides that the shares of stock of banks shall be assessed and taxed as other property in the name of the shareholders of the several shares thereof, to be entered and taxed in the name of and be payable by the bank, and Sec. 3071 provides that the bank shall be considered as located in every county, city or town wherein it has an office for the purpose of carrying on its business and the shares shall be subject to taxation in any county, city or town wherein

it has such office and, further, that the shares shall be taxed in each county, city or town for only such proportion of their value as the assets situated in that county, city or town bear to the assets of the entire bank." Then follows the concluding sentence which petitioner claims requires him to assess said bank stock at not less than the value of the real and tangible personal property owned by the bank in his county. We do not think that such is the proper interpretation of said concluding sentence. We think think this sentence simply means that the shares of bank stock shall not be assessed in any county at less than their actual cash value which is to be determined from the actual cash value of the bank's taxable property, i.e. the bank's assets in that county. The language has not been construed by the Supreme Court of Arizona but the one case in that court bordering upon the question would seem to indicate that the interpretation we have submitted would be accepted by that court.

Yavapai County Savings Bank v. State Tax Commission,
52 Ariz. 374
81 Pac (2d) 86.

But, even if we take petitioner's interpretation of the concluding sentence of Sec. 3071, the attack in this case is not upon the constitutionality thereof, but, rather, upon the failure of the assessor to recognize the exemption from taxation of values represented

by the preferred stock of the bank held by Reconstruction Finance Corporation.

It appears from the complaint that the real and personal property assessed in Pima County was acquired by the bank by the use of $400,000 of the money obtained from Reconstruction Finance Corporation by the sale of the bank's preferred stock (Exhibit attached to petition Par. XIV, pages 29-30). Thus, insofar as this case is concerned, the erroneous and excessive assessment in Pima County arises not out of the application of Sec. 3071 Revised Code of Arizona, 1928, but arises out of the failure of the assessor to give effect to the exemption from taxation of the values represented by the preferred stock. In other words, the complaint does not attack the constitutionality of Sec. 3071 but does attack the failure of the county assessor to recognize the exemption provided by the act of Congress of March 20, 1936, and such a failure is not an attack upon the constitutionality of a state statute within the meaning of Sec. 266.

Ex parte: Buder, 271 U. S. 461
70 Law Ed. 1036,
46 S. Ct. 567.

In this case as well as in the Buder case the question of whether or not the assessment is invalid depends upon the application of the act of Congress not upon the state statute for if it were not for the Federal Act the assessment in this case would not be

invalid, except as it would be in violation of the State Constitution. Unconstitutionality under the State Constitution does not give rise to a three-judge case.

Stratton v. St. Louis Southwest Ry. Co.,
282 U. S. 10-18
75 Law Ed. 135
51 S. Ct. 8.

Cook v. Burnquist,
242 Fed. 321

Recognition must be given to the fact that the trial judge, who declined to call in the additional judges, considered the questions presented, and concluded that the constitutionality of the State Act was not attacked.

Ex parte: Hobbs, 280 U. S. 168, 172,
74 Law Ed. 353,
50 S. Ct. 83.

It is settled that Sec. 266 applies only where there is a substantial claim of invalidity under the Federal Constitution.

Stratton v. St. Louis Southwest Ry. Co.,
282 U. S. 10-18,
75 Law Ed. 135
51 S. Ct. 8

City of Springfield v. United States,
99 Fed. (2d) 862

We respectfully submit that the contention that the complaint charges the unconstitutionality of Sec. 3071

Revised Code of Arizona, 1928, is not substantiated. Said contention is based upon a questionable interpretation of the statute and, even if that interpretation is admitted, the alleged invalidity of the assessment does not arise out of the statute itself, but arises out of the failure of the assessing official to recognize the Federal Statute and the State Constitution as a limitation upon or exemption from the terms of the statute and, thus, no case for a three-judge court is presented under Sec. 266.

We respectfully submit that petitioner fails to make out a case for a three-judge court for the reasons herein presented.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF ARIZONA

ARTICLE XII.

Section 1. Each county of the State, now or hereafter organized shall be a body politic and corporate.

Section 2. The several counties of the Territory of Arizona as fixed by statute at the time of the adoption of this Constitution are hereby declared to be the counties of the State until changed by law.

Section 3. Subject to change by law, there are hereby created in and for each organized county of the State the following officers who shall be elected by the qualified electors thereof: Sheriff, Recorder, Treasurer, School Superintendent, County Attorney, Assessor, County Superintendent of Roads, and Surveyor, each of whom shall be elected for a term of two years, except that such officers elected at the first election for State and County officers shall serve until the first Monday in January, 1913; and three Supervisors, whose term of office shall be provided by law, except that at the first election for county officers the candidate for Supervisor receiving the highest number of votes shall hold office until the first Monday in January, 1915, and the two candidates for Supervisor, respectively, receiving the next highest number of votes shall hold office until the first Monday in January, 1913.

Sec. 760. County a body corporate; name of county, corporate name. Every county is a body politic and corporate, and the name of the county designated in this chapter is its corporate name, by which it must be known and designated in all actions and proceedings.

Sec. 761. Powers. Its powers can be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law. It has the power to sue and be sued; to purchase and hold lands within its limits; to make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers; to make such orders for the disposition or use of its property as the interests of its inhabitants require, and to levy and collect such taxes for purposes under its exclusive jurisdiction as are authorized by law.

ARTICLE 7. County Treasurer

Sec. 864. Duties. The county treasurer shall: 1. Receive all money of the county, and all other money directed by law to be paid to him, safely keep, apply and pay the same and render account thereof as required by law; 2. keep an account of the receipt and expenditure of such money in books provided for that purpose; in which must be entered the amount, the time when, from whom, and on what account the money was received by him; the amount, time, when, to whom, and on what account disbursements were

made by him; 3. keep his books so that the amount received and paid out on account of separate funds or specific appropriations are exhibited in separate and distinct accounts, and the whole receipts and expenditures shown in one general or cash account; 4. enter no money received for the current year on his account with the county for the past fiscal year, until after his annual settlement for the past year has been made with the board of supervisors; and, 5. disburse the county money only on county warrants, issued by the board of supervisors, signed by the chairman and clerk of such board, or as provided by law.

Sec. 873. Settlements monthly and annually by treasurer. The treasurer shall settle all his accounts of the collection, care and disbursement of public revenue, with the board of supervisors on the first Monday in each month. For that purpose he shall make out a statement under oath, of the amount of money or other property received, the sources from which derived, the amount of payments or disbursements, and to whom, with the amount remaining on hand. He shall, in such settlement, deposit all paid warrants with the clerk of the board of supervisors, taking his receipt therefor, and the amount of the warrants so deposited shall be entered to the credit of the treasurer in his account. He shall also make a full settlement with the board of supervisors annually, on the last business day of December, and transmit a copy of his statement and make an annual report to the

state treasurer before the fifteenth day of each January.

Sec. 874. Report of receipts and disbursements at regular meetings of board. The treasurer shall make a detailed report at every regular meeting of the board of supervisors of his county, and at such other times as the board may require, of all moneys received by him and the disbursement thereof, and of all debts due to and from the county, and of all other proceedings in his office, so that the receipts into the treasury and the amount of disbursements, together with the debts due to and from the county, may clearly and distinctly appear.

Sec. 875. Penalty for failure to make settlements. If the county treasurer neglect or refuse to settle or report as required by law, he shall forfeit and pay to the county, the sum of five hundred dollars for every such neglect or refusal, and the board of supervisors shall institute action for the recovery thereof.

Sec. 876. Transmitting of money to state treasurer. Upon the receipt of an order from the state treasurer requiring the money in the county treasury belonging to the state or collected for it, to be transmitted to the state treasury in the manner prescribed by law, the county treasurer shall within ten days thereafter transmit the same in the manner directed by the state treasurer, and as provided by law, and such transmittal

shall be at the risk of the state, if sent as the state treasurer directed.

Sec. 3136. Tax not to be contested unless paid; collection may not be enjoined. No person upon whom a tax has been imposed under any law relating to taxation shall be permitted to test the validity thereof, either as plaintiff or defendant, unless such tax shall first have been paid to the proper county treasurer, together with all penalties thereon. No injunction shall ever issue in any action or proceeding in any court against this state, or against any county, municipality, or officer thereof, to prevent or enjoin the collection of any tax levied. After payment an action may be maintained to recover any tax illegally collected, and if the tax due shall be determined to be less than the amount paid, the excess shall be refunded in the manner hereinbefore provided.

SUPREME COURT OF THE UNITED STATES.

No. —, Original.—October Term, 1939.

Ex parte Wallace S. Bransford. } Motion for leave to file petition for writ of mandamus.

[May 20, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

The county treasurer and ex-officio tax collector of Pima County, Arizona, moves to file a tendered petition for a writ of mandamus to be directed to District Judge Ling of the federal district court for that state. A rule to show cause has issued and the return has been made. Petitioner, a county treasurer, and other officials are defendants together with their counties, in a suit brought in the district court by the Valley National Bank in which the Bank is seeking an interlocutory and permanent injunction against the collection of certain taxes by the counties. The district judge has ruled that he will hear the case while sitting alone and petitioner contends that under Section 266 of the Judicial Code he is entitled to have the case heard before three judges. Mandamus is the proper remedy.[1]

Arizona taxes shares of bank stock in the name of the shareholders and requires the bank to pay for them.[2] Assessments are made in the first instance by county assessors, with an appeal allowed first to a county and then to a state board of equalization. The state board returns the final assessment with a levy of the rate for state purposes to the county supervisors. This body adds the several local rates and places the assessment upon the tax roll. Collection is performed by the county treasurer,[3] and the taxes collected are apportioned between state and county.[4] Where a bank is doing business in several counties the value of its stock is apportioned

[1] Ex parte Williams, 277 U. S. 267, 269; Stratton v. St. Louis Southwestern Ry., 282 U. S. 10, 16.

[2] Revised Code of Arizona, 1928, §§ 3069-71.

[3] *Id.*, § 3110.

[4] *Id.*, § 3111.

among the counties in accordance with the assets located in each. Because other property in the state has been under-assessed the state board in 1935 ordered that bank shares be valued at 75% of capital stock, surplus and undivided profit. Assets, borrowings, deposits and other liabilities are disregarded.

The petitioner is the only defendant to apply for mandamus. As the issuance of such an order depends on the jurisdiction of the single district judge, sitting alone, over the suit pending in the district court, this is sufficient. As the issues with this petitioner in that suit include those with all other defendants, we do not need to state the issues arising with the officials of counties other than Pima. The Bank states its controversy with the petitioner arose in the following manner. The Bank had branches in several counties. It had common capital stock, a surplus and undivided profits. Also the Bank had an issue of preferred which it had sold to the Reconstruction Finance Corporation prior to the time of the 1935 assessment at the par value of $1,240,000 and which the Reconstruction Finance Corporation still owns. Taking the position that the preferred owned by the Reconstruction Finance Corporation could not be taxed, the Bank reported a total value of $524,629.50, 75% of $699,026 (the amount of its common, surplus, undivided profits and reverses), as the total taxable value of its shares, and apportioned this among the counties according to the assets there located. On this basis $139,088.80, 26.53% of its total taxable value, was apportioned to Pima County. The assessor of Pima County made an assessment of $327,590, the "actual cash value of the real and personal property" situated in Pima County. By agreement of the parties, the Bank paid the amount which under its computation was due Pima County, the right to litigate the validity of the county's assessment being reserved. Subsequently, the petitioner having threatened to institute proceedings to enforce the county's assessment, the Bank brought its suit in the district court to enjoin collection.

The Bank by its bill in the district court seeks an injunction upon several grounds. We are of the opinion that none of these compels the trial judge to call a three-judge court under Section 266.

The assessment in Pima County was made in the amount of the value of the Bank's real estate and personal property. It is therefore, says the Bank, impossible to tell whether the assessment is the valuation of the property, the proportion of the value of the common

[3] *Id.*, § 3071.

stock alone or that of the aggregate of the common and preferred. An assessment upon the property, it is alleged, is "void as unauthorized by the statutes of Arizona." If the valuation includes the preferred stock, the complaint alleges it is invalid because of the Act of March 20, 1936, exempting the preferred stock while owned by the Reconstruction Finance Corporation.[6] If the valuation is upon the common stock alone, it is said to be invalid (1) because the valuation is far beyond the actual value and therefore confiscatory and (2) because the valuation is discriminatory since the common stock in other banks is assessed at 75% of the value of common stock, surplus and undivided profits and other classes of property at sixty per cent of its actual value, while this valuation is on the basis of approximately twice the common stock, surplus and undivided profits of the bank and twice its actual value. It is further alleged that this excessive and discriminatory valuation violates R. S. § 5219 which limits the rate of taxation of national bank shares to that assessed "upon other moneyed capital in the hands of individual citizens . . . coming into competition with the business of national banks." It is prayed that action under these assessments for the reasons stated be enjoined as violative of the Constitution and laws of the United States and Arizona.

Section 266 lays down as one of the requirements for a three-judge court that the injunction against the officer of the state to restrain the enforcement, operation or execution of the state statute must be sought "upon the ground of the unconstitutionality of such statute."

In so far as it is alleged that the asessments are void because unauthorized by the Arizona statute, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the federal Constitution.

The allegations that the assessments should be enjoined because violative of the statute exempting preferred stock owned by the Reconstruction Finance Corporation and R. S. § 5219 depend upon no constitutional provision within the meaning of Judicial Code Section 266. If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law[7] or in

[6] 49 Stat. 1185.

[7] Pittman *v.* Home Owners' Corp., 308 U. S. 21.

a manner forbidden by the National Banking Act.[8] The declaration of the supremacy clause[9] gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment. This was decided as to Section 266 in *Ex parte Bider*,[10] and before that a similar result had been reached in *Lomke* v. *Farmers Grain Company*[11] in regard to a provision of the Judicial Code granting direct appeal to this Court in cases where the sole issue[12] was the unconstitutionality of a state statute.[13]

It is said, however, that the allegations of confiscation and discrimination in valuation of the common shares in comparison with the stock of other banks and other property show the injunction is sought upon the ground of the unconstitutionality of the statute. This point depends upon excessive valuation of the shares. The validity of the statute itself is not involved. Variations by assessors in valuations of like property, taxable under the same statute, sufficiently marked to be discriminatory under the Constitution or valuations so large as to be confiscatory cannot properly be said to be the basis for attack on the ground of the unconstitutionality of the statute. Such assessments, if made and if invalid, are so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself.[14]

But it is said by the petitioner here that the last sentence of Section 3071 requires this excessive and discriminatory assessment. That sentence reads: "When a bank maintains branches or conducts business in more than one county, city or town, the assessed value of the capital stock shall be apportioned among the several counties, cities and towns in which the main office or such branches are maintained or business conducted, and the amount apportioned to each county, city or town shall not be less than the actual cash value of the real

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[8] R. S. § 5219; Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, 668.

[9] Art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . ."

[10] 271 U. S. 461, 465-66.

[11] 258 U. S. 50, 52.

[12] Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 407.

[13] See W. A. Beard Truck Line Co. v. Smith, 12 F. Supp. 964.

[14] Cf. Ex parte Williams, 277 U. S. 267, 271; Jett Bros. Co. v. Carrollton, 252 U. S. 1, 5.

and personal property of such bank situated in such county, city or town." If this is interpreted as requiring that the apportionment of the value of the capital stock to each county must not be less than the tangible property in that county, the aggregate apportionment may be much larger than the assessed value of the stock. A greater assessment per share will occur if the total valuation is allocated to common shares only. If the valuation, reached under the formula by treating the preferred as capital stock, is allocated among the common shares, only, it would mean that the preferred was treated as stock for purposes of the valuation and disregarded for the assessment of individual shares. The argument of petitioner is that if the result, as he contends the Bank alleges, violates the federal Constitution by discrimination of common shares as compared to shares of other banks without preferred stock or owners of other property, the statute violates it. Therefore, in effect, the attack on the constitutionality of the assessment is an attack on the constitutionality of the statute.

The contention of the Bank, however, is that the assessor misinterpreted the statute; that the objectionable aspect of the assessment is the attribution to the common of the whole amount instead of an apportionment to both preferred and common or the use of the preferred as capital stock in the state valuation formula. We are not now called upon to reach any conclusion upon the meaning of the Arizona tax statutes. If the trial court determines that the assessment complained of is made properly under the statutes and that by the statute the assessment is to be prorated among the common shares, it would determine only a question of statutory construction. It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court,[15] and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court.[16] In such a case the attack is aimed at an allegedly erroneous administrative action.[17] Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a

[15] Stratton v. St. Louis Southwestern Ry., 282 U. S. 10.

[16] Ex parte Hobbs, 280 U. S. 168.

[17] Ex parte Williams, *supra*.

three-judge court, any more than if the complaint did not seek an interlocutory injunction.[18] Where by an omission to attack the constitutionality of a state statute, its validity is admitted for the purposes of the bill, a determination by the trial court that the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill. Jurisdiction, properly assumed, may be lost by the special court, when it appears that a prerequisite such as need for relief against state officers is lacking.[19] Even where the statute is attacked as unconstitutional, Section 266 is inapplicable unless the action complained of is directly attributable to the statute.[20] There is no indication that Congress sought by Section 266 to have every attack on the constitutionality of a state statute determined by a three-judge court. It sought such a bench only to avoid precipitate determinations on constitutionality on motions for interlocutory injunctions.

As the foregoing ground adequately disposes of the petition for mandamus, we do not discuss the other reasons for refusal urged by the Bank.

The motion to file the petition for mandamus is denied.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[18] Stratton v. St. Louis Southwestern Ry., 282 U. S. 10, 15.

[19] Oklahoma Gas Co. v. Packing Co., 292 U. S. 386, 391.

[20] Ex parte Collins, 277 U. S. 565, 567, 569.